

V. THE COMMISSION'S REGULATIONS TO ENSURE COMPLIANCE WITH THE CAPACITY ALLOCATION REQUIREMENTS SHOULD NOT PREJUDGE ANY PARTICULAR SYSTEM CONFIGURATION OR NETWORK DESIGN

As noted at the outset, it is critical to the development of competitive OVS networks that the Commission implement the provisions of the 1996 Act in a way that allows local exchange carriers, and particularly new local competitors such as MFS, sufficient flexibility to develop demand-driven products and services that are compatible with their networks and that therefore sustain infrastructure and technology investment. Only by doing so will the goal of Congress to “encourage telephone company entry and spur competition and new investment” be realized. It will be critical to such development for all local telephone companies -- incumbent and new -- to have broad flexibility to determine where and how to construct and operate OVS platforms in response to their own individual assessment of demand and their own creativity in developing a platform structure to accommodate it. That analysis will also need to be based in part on each operator's technical network configuration, capacity, and location. Given the vastly different networks of incumbent local exchange carriers and new entrants like MFS, a different OVS platform configuration is inevitable -- and indeed desirable.

The Commission's challenge, therefore, is to develop rules which allow carriers the “broad flexibility” to develop OVS networks which justify the investment in “transmission infrastructure and technology” to bring the desired competition to the market, and which also conform to the obligations set forth in the 1996 Act.^{33/} The most difficult task in this regard will be for the Commission to develop a specific rule to implement of the statutory requirement that, when demand

^{33/} See NPRM at ¶¶ 2 and 4.

for use of an OVS system exceeds the capacity of that system, an OVS operator and its affiliated programmers will be limited to “selecting” the programming on only one-third of the system’s channels. Specifically, the statute provides:

if demand exceeds the channel capacity of the open video system, [the Commission shall prescribe regulations that] prohibit an operator of an open video system and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity on such system, but nothing in this subparagraph shall be construed to limit the number of channels that the carrier and its affiliates may offer to provide directly to subscribers.^{34/}

In raising proposals to implement this provision of the 1996 Act, the Commission’s *Notice* has clearly approached the issue based upon its experience with incumbent local exchange carrier VDT system designs. Certainly, any rules developed here must be drafted in the expectation that at least some incumbent local exchange carriers will indeed proceed with plans to implement such platforms, which were designed from the starting point of an existing ubiquitous telephone network. In order for OVS competition to develop beyond the incumbent local exchange carrier, however, the rules must also encompass the development of OVS networks by other local exchange carriers.^{35/}

^{34/} 1996 Act § 653(b)(1)(B).

^{35/} As noted above, MFS also expects that, if such flexibility were permitted by the rules, some of the incumbent local exchange carriers who might otherwise have found the VDT configuration uneconomic, could likely proceed with OVS networks engineered in a more demand-driven configuration.

A. Definition of “Demand” and “Capacity”

The way that the Commission defines the terms “demand” and “capacity” will be essential to determining whether economic demand-driven OVS networks can be developed.^{36/} Clearly, since excess “demand” signals certain obligations under the Act, it is essential that a carrier be assured that a request for capacity is *bona fide* prior to undertaking any required construction or re-allocation of existing capacity. To assure that demand is *bona fide*, an OVS operator should be allowed to require a reasonable showing of good faith and legitimate intent, including, but not limited to: a deposit, a demonstration of financial and technical capability, a firm term commitment, and a detailed description of the requested facilities, including capacity and bandwidth requirements, subscriber locations, headend location, and such other technical specifications as needed by the OVS operator.

In the type of OVS system which MFS envisions as economically feasible for carriers who do not have existing ubiquitous networks and who have high capacity fiber optic transmission facilities where technology developments over the past several years have increased capacity many-fold, the term “capacity” should not be limited to existing system locations and capacity but should allow for systems whose capacity can be increased either by developments in electronic technology or by new construction. MFS, for example, will need to base its OVS facilities on demand and ascertain, in response to such demand, how to configure and allocate costs for its initial OVS facilities. Accordingly, the measurement of “capacity” for an expanding system of a new entrant

^{36/} See NPRM at ¶¶ 16-19. The Commission’s *Notice* requests proposals for determining the capacity of a system, but not for determining the demand. The statute, as written, does not expressly require the Commission to adopt regulations to determine either concept. To develop a rule to implement a requirement limiting an operator’s ability to select programming when demand exceeds capacity, both terms must be defined.

cannot be measured as an absolute number at any point in time. The capacity of such a system must therefore include not only the capacity of existing infrastructure, but that which can be produced by facilities that the operator can reconfigure, re-engineer or construct within a reasonable period of time. (As discussed below, MFS submits that such a definition will also serve to eliminate the re-allocation dilemma which the *Notice* raises wherein programming capacity might otherwise have to be taken away from existing programmers and their subscribers.)

B. Notice

The Commission has requested comments on whether the Commission should require an OVS operator to publish notice of its intent to establish an open video system in a given area, and what the nature and extent of that notice should be.^{37/} As a threshold matter, MFS notes that the Commission's concern that OVS operators provide notice of available capacity follow from the expectation that "capacity" is an amount of bandwidth available at a particular point in time and that the OVS operator will have built a ubiquitous OVS platform throughout a particular area with whatever capacity it expects, in a vacuum, to need to serve demand. Then, like the land rushes in the last century, the carrier must line up all of the demand at a starting gate and hope that it matches capacity. If the carrier has guessed wrong and capacity is too great, then it will have wasted capital, and if capacity is too little, it must be rationed in a way that will likely not accommodate any programmer's needs. This, of course, is just the opposite of a demand-driven system -- and is surely not the way that a competitive marketplace generally functions. And it is certainly not a viable way for a carrier to proceed who must construct its capacity requirements from scratch and who, because

^{37/} *NPRM* at ¶ 14.

it cannot economically justify constructing a ubiquitous programming network, certainly cannot afford to construct such capacity without a customer who has demanded it.

This is not to say, however, that the Commission's concept of notice is entirely unwarranted with respect to implementation of the Act's capacity requirements. MFS suggests that an OVS provider should be required, as part of its Certificate of Compliance, to designate the market area in which it will offer OVS. (To the extent that it will offer OVS in multiple areas, each area should be designated and additional Certificates filed if new areas are subsequently added.) Such designations would likely be filed based upon the OVS operator's general business plan or in response to a request by a programmer to offer programming in a given geographic area. Once the Certificate is filed, MFS would propose to permit other programmers to have 45 days to submit a *bona fide* request to provide programming in the OVS market as well, which request would designate with particularity the specific locations which the programmer seeks to serve, as well as the bandwidth capacity needed. When all of the requests are received, the OVS operator would either need to divide up existing facilities among all of the requesting programmers, including itself or its affiliate, or build sufficient additional facilities to accommodate the demand. Should demand exceed available capacity in either case, the OVS operator and its affiliates could control no more than one-third of the capacity.

C. Changes in Demand/Capacity

The Commission also requests comment on how to maintain the required two-thirds/one-third channel selection ratio within a system if demand and capacity change over time. The Commission correctly notes that to require re-allocation would be harmful to the development of OVS if a programmer were required to relinquish existing channels -- thereby causing disruption of

services to customers and substantial market uncertainty.^{38/} Unless the Commission's rules can mitigate these detrimental effects, OVS will be nothing more than a statutory concept -- there will simply be no market possibility for such a service to exist, since the marketplace -- both capital markets and consumer markets -- will not support or tolerate such uncertainty or disruption.

Recognizing that constant re-allocation will be a death knell to OVS, the Commission suggests limiting the entrance of new programmers to periodic enrollment periods.^{39/} This concept would indeed serve to mitigate some of the detrimental effects by assuring a "planning horizon." However, no matter how long the horizon, the uncertainty of perhaps having to contract existing programming offerings would be a market disaster. Accordingly, MFS suggests that, coupled with enrollment periods of not less than 3 years, the Commission provide that an OVS operator for whom demand expands to exceed available capacity and whose own or affiliate's programming exceeds one-third of that existing capacity may maintain compliance with the statute either by re-allocating existing capacity or by constructing new capacity within a reasonable period of time from the beginning of the re-enrollment date. MFS submits that such period should be at least six months to allow a carrier a reasonable time to assess demand requirements on the existing facilities and to reconfigure, re-engineer or construct new facilities.

D. Allocation Procedures

The Commission has also requested comments on "whether the Commission should design procedures to allocate the two-thirds of channel capacity that must be selected by unaffiliated video

^{38/} *NPRM* at ¶ 25.

^{39/} *Id.*

programming providers, or whether the method of allocating capacity in this situation should be left to the discretion of the open video system operator.”^{40/} MFS strongly asserts that the latter is the only feasible proposal. The Commission cannot possibly fashion a single regulation that takes into account every type of OVS platform and how each can be divided among programmers. The Commission should simply require, as does the statute, that channel capacity be allocated on a non-discriminatory basis among affiliated and non-affiliated programmers. There is no reason to fear that discrimination will go unremedied. First, the market will eliminate it by drawing programmers to non-discriminatory systems. Second, any such discrimination could be eliminated through the complaint process provided for by Congress.

VI. TO ASSURE INFRASTRUCTURE DEVELOPMENT AND AVOID ANTI-COMPETITIVE PRACTICES, THE COMMISSION SHOULD PRECLUDE A CABLE TELEVISION OPERATOR FROM DISTRIBUTING PROGRAMMING OVER ANY OVS NETWORK IN ITS CABLE SERVICE AREA

MFS agrees with the Commission’s concern that permitting a cable television operator to distribute video programming over an OVS network in its service territory may run counter to the intent of Congress to introduce additional facilities-based competition in the marketplace.^{41/} Permitting the cable television operator or its programming affiliates to distribute programming over a competing OVS platform would permit a cable operator, which has its own franchise to construct facilities, to instead tie up capacity on a competitor’s network, either directly or through a programming affiliate, without any reciprocal ability on the OVS operator’s or its programmer

^{40/} *NPRM* at ¶ 24.

^{41/} *NPRM* at ¶ 15.

customers' parts to use the cable operator's capacity. Moreover, the ability to take programming capacity on a competitor's system would be susceptible to substantial competitive abuse if capacity in an OVS network is limited, since the cable operator, in addition to avoiding its own construction costs, could at the same time effectively limit its competitor's programming and thereby limit competition in the marketplace. It would also give the cable operator (either directly or through its programming affiliates) access to confidential business plans and information. And, as the Commission learned in its VDT proceedings, it would provide a vehicle for the cable operator to tie up the OVS operator in regulatory arenas with frivolous challenges and proceedings.

Clearly, given the fact that the incumbent cable operators have franchises to construct their own facilities and have a significant head-start in the market, there is no need for the Commission to provide for an opportunity for a cable operator to avoid developing its own alternative infrastructure, or to risk the competitive harm which would result from requiring an OVS operator to permit access to transmission facilities by the incumbent cable provider. A prohibition in this regard is consistent with the Commission's cellular decisions, where the Commission held that a facilities-based carrier of these services should be allowed to deny resale to other fully-operational facilities-based carriers.^{42/} This exception to non-discrimination rules has been deemed valuable by the Commission because it promotes competition "by encouraging each licensee to build out its

^{42/} See *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Notice of Proposed Rulemaking, CC Docket No. 94-54, FCC 95-149, at ¶ 62 (1995) ("CMRS Order"); *In the Matter of Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies*, Notice of Proposed Rule Making and Order, CC Docket No. 91-33, 6 FCC Rcd 1719, 1724 (1991).

network.”^{43/} Consequently, the Commission held that companies offering these services were only required to offer resale to other facilities-based carriers until they were fully operational. The same reasoning justifies permitting OVS operators to deny carriage of programming on behalf of local cable television operators.^{44/}

VII. OVS OPERATORS SHOULD BE PERMITTED TO ASSURE COMPLIANCE WITH MUST-CARRY, PEG AND PROGRAM EXCLUSIVITY REGULATIONS EITHER DIRECTLY OR THROUGH CONTRACTS WITH PROGRAMMERS

The Commission has also requested comments on how it should implement in the OVS context a number of the programming obligations imposed on cable television operators:

- ▶ Must-Carry Obligations
- ▶ Public/Educational/Governmental (PEG) Access
- ▶ Retransmission Consent
- ▶ Sports Exclusivity Requirements
- ▶ Network Non-Duplication
- ▶ Syndicated Exclusivity Provisions

The manner in which these obligations and requirements can most effectively and appropriately be met will depend to some extent on the OVS network configuration and the type of service offered by programmers over that network. In some cases, particularly where programming entities transmit a full package of video programming to their subscribers, it may be more appropriate for OVS

^{43/} CMRS Order at ¶ 62.

^{44/} Unlike the cellular context, however, where the Commission did impose a resale obligation for a brief period to account for the “head-start” of one licensee, here it is the incumbent cable television operator which has a significant “head-start.” Consequently, there is no basis for a “head-start” window to apply before an OVS operator should be permitted to deny carriage to the cable television competitor of its programmer customers.

operators to assure compliance with these obligations and requirements through its contracts with the programmers.^{45/}

The manner in which OVS operators and/or their customer programmers comply with PEG obligations should generally be worked out between the programmer and the local government entity that oversees the implementation of these rules for cable companies. The Commission should, however, require that OVS operators may not be required to duplicate PEG facilities or programming but rather, consistent with the requirement that PEG obligations should be no greater or less than those imposed on the cable operator, the local cable franchising authority should assure that the OVS operator has access to existing PEG channel feeds so that it may comply with the 1996 Act by making such programs are available on its OVS platform for programmers to deliver to their subscribers. It is MFS' understanding that the costs of maintaining such facilities is typically collected as part of the cable franchise fee. To the extent that the franchising authority elects to charge OVS operators a fee based on its OVS revenues pursuant to 47 U.S.C. § 573(c)(2), the *pro rata* cost of such facilities will be recovered.

VIII. REGULATIONS RELATED TO COMMUNICATIONS WITH SUBSCRIBERS

The statute requires that the Commission adopt regulations that

prohibit an operator of an open video system from unreasonably discriminating in favor of the operator or its affiliates with regard to

^{45/} It should be noted that the sports and syndicated exclusivity and the network non-duplication provisions apply only if the network, syndicator or sports organization files a request with the programmer.

material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming.^{46/}

The Commission has suggested that this provision should only apply “when the open video system operator is the only entity that deals directly with the subscriber.”^{47/} MFS agrees that this is the only reasonable interpretation of this provision. Where programmers have their own relationships with subscribers and deal directly with them on matters such as billing, customer service and marketing, there is no basis for such a provision. Put simply, there is no reason to require programmers to distribute material or information to another programmer’s subscribers (or more absurd, its own subscribers) if the other programmer has the means to distribute its own information.

With respect to the section of the statute that requires non-discriminatory inclusion of all programmers or operators on any menu, guide or navigational device, MFS submits that the operator should be considered in compliance provided it lists all programs available to the subscriber over the facility utilized by that subscriber.

IX. CONCLUSION

For the foregoing reasons, MFS urges the Commission to adopt rules which will permit OVS operators the broadest possible flexibility within the scope of the 1996 Act to design and implement OVS networks. MFS encourages the Commission not to adopt any regulation that can only be applied to a single type of OVS system, and that it confirm explicitly that it intends by its rules to promote the development of OVS systems and infrastructure by all local exchange carriers, including

^{46/} 1996 Act § 653(b)(1)(E)(i).

^{47/} NPRM at ¶ 49.

non-dominant carriers. If the explosion of communications technology and services over the past few years has taught us anything, it is that there will continue to be change and that this change cannot always be accurately anticipated. Therefore, in order to avoid the chilling of new developments and to eliminate the need to constantly amend these regulations, the Commission should adopt the most flexible scheme that will adequately ensure compliance with the applicable statutes. MFS believes its proposals accomplish this goal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jean L. Kiddoo", is written over a horizontal line.

Andrew D. Lipman

Jean L. Kiddoo

Karen M. Eisenhauer

SWIDLER & BERLIN, Chartered
3000 K Street N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500

Counsel For MFS
Communications Company, Inc.

Dated: April 1, 1996